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SUPERIOR COURT OF STATE OF ARIZONA

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COUNTY OF YAVAPAI

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14 STATE OF ARIZONA,

15 Plaintiff,

16 vs.

17 JAMES ARTHUR RAY,

18 Defendant.

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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2010 DEC 14 PM 2:57

CLERK

BY: A. CASCIO

CASE NO. V1300CR201080049

Div. PTB

**DEFENDANT JAMES ARTHUR RAY'S
MOTION FOR CLARIFICATION OR
RECONSIDERATION OF RULING ON
STATE'S MOTION FOR PROTECTIVE
ORDER RE: STATE'S NOTES OF
WITNESS INTERVIEWS**

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1 The State moved for a protective order of the prosecutor's *notes* reflecting an expert's
2 statements—not for immunity from disclosure of all expert statements in any form.

3 The parties have now essentially resolved the dispute underlying the Court's Order. By
4 letter dated December 10, the State has informed the defense that its expert witnesses will prepare
5 reports by the end of December, and that the State will promptly disclose those reports to the
6 defense. Mr. Ray nevertheless submits this motion to clarify the scope of the Court's Order and
7 ensure that it does not have unintended breadth. Clarification of the Order will avoid prejudice to
8 the discovery rights of both parties.

9 **II. ARGUMENT**

10 **A. Arizona Rules of Criminal Procedure entitle a criminal defendant to 11 discovery of an expert's statements.**

12 Arizona's Rules of Criminal Procedure and case law mandate disclosure of an expert
13 witness' statements. Rule 15.1(e)(3) provides that the "prosecutor *shall*, within thirty days of a
14 written request," disclose "[a]ny completed written reports, *statements* and examination notes
15 made by experts listed in subsections (b)(1) and (b)(4) of this rule in connection with the
16 particular case." *Id.* 15.1(e)(3)(emphasis added).¹ In turn, Rule 15.1(b)(1), to which 15.1(e)(3)
17 refers, requires the prosecutor to disclose "the names and addresses of *all persons* whom the
18 prosecutor intends to call as witnesses in the case-in-chief together with their relevant or recorded
19 *statements*." *Id.* 15.1 (b)(1) (emphasis added). A "statement" is "(i) [a] writing signed or
20 otherwise adopted or approved by a person; (ii) [a] mechanical, electronic or other recording of a
21 person's oral communications or a transcript thereof, and (iii) [a] writing containing a verbatim
22 record or a summary of a person's oral communications." *Id.* 15.4(a)(1).

23 The Rules thus make explicit that disclosure of experts' statements is required. The case
24 law confirms the same. In *State v. Roque*, 213 Ariz. 193 (2006), there was no question but that

25
26 ¹ The thirty-day deadline applies "unless otherwise ordered by the Court." Rule 15.1(e)(3). See
27 *State ex rel. Thomas v. Newell*, 221 Ariz. 112, 115 (App. 2009) ("[0]The court has discretion to
28 vary from those deadlines, as evidenced by the language '[u]nless otherwise ordered by the court'
that begins subsections (a), (c), and (e).").

1 the rules required disclosure of an expert's statements. Indeed, the version of Rule 15.1(b)(4) that
2 was then in effect required disclosure of "the results of physical examinations and of scientific
3 tests, experiments, or comparisons, including *all written reports or statements* made by them in
4 connection with the particular case." 213 Ariz. 193, 206 (2006).² In *State ex rel. Thomas v.*
5 *Newell*, the court noted that under the version of 15.1(b)(4) now in effect, "the defense can make
6 a written request for the State to make available 'completed written reports, statements and
7 examination notes made by experts listed in subsections (b)(1) and (b)(4) of this rule.' Ariz. R.
8 Crim. P. 15.1(e)(3)." 221 Ariz. 112, 115 (App. 2009).

9 The defense has never taken the position that the State need not provide the statements of
10 expert witnesses. See RT at 11:11–16 (Ms. Do: "So if Ms. Polk doesn't want to disclose her
11 notes -- we're not requiring it to be given to us in that form. We're asking for disclosure of what
12 his opinion, analysis and conclusion are with respect to the evidence he's reviewed in this case.");
13 cf. Order at 2. Nor does the defense understand the State to be taking such a broad position. See
14 RT at 14:12–15 (Ms. Polk: "I think we're all in agreement. They do get statements made by this
15 expert. I don't believe the state has any at this point. But if and when we get them, we will
16 certainly disclose them."). Instead, the dispute at issue, as reflected in the State's Motion for
17 Protective Order, focused on disclosure of the *prosecution's* notes. The Court's own statements
18 at the hearing, holding that the State must disclose to the defense the notes of the State's expert
19 witnesses, suggest that the Court itself did not intend the broad limitation on expert discovery that
20 the Order's wording suggests. See RT at 15:17–23 (The Court: "I agree you're going to get to
21 look at the notes that go into that person's work on the case once that person is listed as a witness,
22 an expert witness. So I didn't mean to not address that. I just thought the harder issue was the
23 question of attorney notes.").

24 ² The Order cites *Rogue* for the proposition that "the language of the rules and the case law do not
25 require the prosecutor—and for that matter, the defendant—to disclose all written or recorded
26 statements of expert witnesses." Order at 2. But *Rogue* draws a distinction between expert and
27 non-expert witnesses only for the purpose of noting that discovery regarding expert witnesses is
28 *broader*. Whereas the rules for discovery regarding non-expert witnesses do "not require the
state to explain how it intends to use each of its witness," the rules for expert discovery require
disclosure of the results of the expert's analysis. *Id.* at 207 (quoting *State v. Williams*, 183 Ariz.
368 (1995)).

1 If the Court's Order is left unclarified, the ruling could be used to frustrate the discovery
2 process by limiting both parties' access to the statements of expert witnesses, and by creating
3 perverse incentives for parties to withhold an expert's reactions and opinions on the theory that
4 there are no "results" to report.

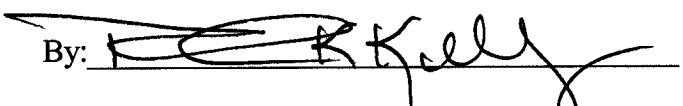
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6 **III. CONCLUSION**

7 The Court's Order appears to unintentionally and severely narrow the parties' disclosure
8 obligations regarding expert witnesses. The defense respectfully requests that the Court clarify its
9 ruling or, in the alternative, reconsider.

10
11 DATED: December 14th, 2010

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16 By: 
17 Attorneys for Defendant James Arthur Ray

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19 Copy of the foregoing
20 delivered this 14th day
of December, 2010, to:

21 Sheila Polk
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24 By 
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1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
2 FOR THE COUNTY OF YAVAPAI

3

4 STATE OF ARIZONA,)
5 Plaintiff,)
6 vs.) Case No. V1300CR20108-0049
7 JAMES ARTHUR RAY,)
8 Defendant.)
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13 REPORTER'S TRANSCRIPT OF PROCEEDINGS
14 BEFORE THE HONORABLE WARREN R. DARROW
15 ORAL ARGUMENT/EVIDENTIARY HEARING
16 RE PENDING MOTIONS, DAY THREE

17 NOVEMBER 16, 2010

18 Camp Verde, Arizona

19 (Partial transcript)

20 (Discussion on disclosure of expert witness notes)

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24 REPORTED BY
25 MINA G. HUNT
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1 Proceedings had before the Honorable
2 WARREN R. DARROW, Judge, taken on Tuesday,
3 November 16, 2010, at Yavapai County Superior Court,
4 Division Pro Tem B, 2840 North Commonwealth Drive,
5 Camp Verde, Arizona, before Mina G. Hunt, Certified
6 Reporter within and for the State of Arizona.

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1 P R O C E E D I N G S

2 (The following is a partial transcript --
3 discussion on disclosure of expert witness notes.)

4 THE COURT: Okay. I'll address that for each
5 motion.

6 I just want to say I want to be ready to
7 move ahead and decide these things when they come
8 up.

9 The juror questionnaires -- the other
10 thing I wanted to bring up is the issue that I asked
11 for argument on. The parties had briefed it
12 comprehensively. But I asked for oral argument.
13 That had to do with obtaining notes of interviews
14 with experts. I'm going to phrase it in that
15 fashion.

16 And I had spent some time writing a ruling
17 and tried to reconcile the disclosure rules. And
18 it's difficult. And I said this during the
19 telephonic argument. There really are valid
20 competing interests here.

21 My conclusion is that in dealing with
22 experts -- and I still choose to write something out
23 on it, and I will do that. But in working with
24 experts I don't think either side wants to be in a
25 situation where in those initial discussions with

1 expert witnesses, it's at a point where what the
2 expert is saying constitutes a discoverable
3 statement. I just don't think that the disclosure
4 rules contemplate that.

5 And the issue is really confined. No one
6 was suggesting that -- the defense had not suggested
7 that this applies to other, if we call them fact
8 witnesses or lay witnesses. And I don't know.

9 Mr. Li, whoever wants to address that.
10 Ms. Do has done that.

11 It's really confined just to the expert
12 witness at this time, isn't it?

13 MS. DO: Yes. And I would argue that it's
14 confined to an even more limited issue here, Your
15 Honor. It was never the defense position that any
16 notes that contained the initial statements during
17 consultation with an expert is discoverable.

18 I think it's important to remember the
19 context in which we received notice that the state
20 was going to call this witness, Rick Ross. Rick
21 Ross was going to actually testify, I think, within
22 17 days.

23 THE COURT: Right. But I was writing the
24 ruling. I dealt with the fact there appeared to be
25 a major change in circumstances from when that first

1 came about and then when we got around to arguing
2 it. So I do understand that distinction.

3 So right now are you still seeking
4 something?

5 MS. DO: We are, Your Honor. And what I was
6 trying to get at is that it's an even more limited
7 issue. We have an expert here for whom we have no
8 idea what his testimony or his statement is going to
9 be other than a five-word sentence that he's going
10 to testify to group behavior.

11 And as the Court had just indicated a
12 moment ago, it's inherently unfair to allow the
13 state -- let me restate that. It's inherently
14 unfair to expect the defense to be able to go in and
15 conduct a meaningful interview of any witness, and
16 in particular an expert witness, without any idea of
17 what he has said previously regarding the proper
18 testimony. I mean, essentially, the party would be
19 stumbling in the dark.

20 And that's what we're asking for. The
21 state can circumvent this issue by having this
22 expert, I think according to standard protocol,
23 write a report or provide his notes. And they've
24 indicated they don't want that done. So we're
25 asking for some discovery so we can conduct a

1 meaningful interview.

2 THE COURT: I'm glad I brought this up because
3 you really answered something I wasn't completely
4 clear on before.

5 Ms. Polk, you indicated you were concerned
6 about chilling of the state's investigation and
7 talking to witnesses if you're going to have to turn
8 over notes. You mentioned that that was a concern
9 of yours.

10 And we're only talking about experts. I
11 don't think those notes in consultation -- notes
12 that are made of consultations have to be turned
13 over, I don't think, if that's the case. But as
14 Ms. Do points out, we're now within three months of
15 trial. And the defense certainly needs to have a
16 comprehensive report of what the expert is going to
17 say or is anticipated to be his testimony.

18 When is that going to happen?

19 MS. POLK: Your Honor, the -- couple things.
20 First of all, this is the same situation that the
21 state is in with respect to the defense expert.
22 They noticed this medical examiner from New Mexico.
23 I've requested the opportunity to interview him.
24 They have told me he's not ready to be interviewed,
25 and they haven't produced any report. I don't know

1 if they're going to or not.

2 With respect to Rick Ross, the decision
3 has not been made whether or not Rick Ross will
4 provide a report. He -- he's in the process of
5 receiving information to review. And then after
6 he's reviewed it, whether he produces a report or
7 not remains to be seen.

8 If he produces a report, obviously the
9 defense has that report. If he doesn't produce a
10 report, which is not required -- if he doesn't
11 produce a report, then I've indicated that the state
12 would provide the defense with a notice of the
13 issues of the areas that we believe Mr. Ross will
14 testify to so that they have something to work from
15 when they interview him.

16 And I would suggest to the Court that this
17 is what happens when you call -- when we call what's
18 called a "cold witness" or a "cold expert" to the
19 stand. Not every expert is familiar with the facts
20 of the case. And cases can proceed with an expert
21 who is called simply to offer information that
22 assists the jury in making a determination without
23 that witness knowing anything about that specific
24 case.

25 And in those cases that witness doesn't

1 produce a report, but that witness is available for
2 an interview. So it's not standard, it's not
3 required, that the witness have a report.

4 With respect to Mr. Ross, I don't know if
5 he's going to have a report or not. With respect to
6 the defense witness, I'm in the same position. I
7 don't know if there is a report or not.

8 But there is no requirement that there be
9 a report. There is no requirement that says in lieu
10 of the report you get the state's notes. The
11 state's obligation is to give the defense full and
12 fair notice about the area that that expert is going
13 to testify about so that they can conduct a
14 meaningful interview. And we absolutely will do
15 that.

16 THE COURT: Ms. Do, there is a difference
17 between the disclosure requirements, comparing the
18 prosecution and the defense in one respect? The way
19 I read the rules, the defense can consult with an
20 expert. And if you don't list that expert, then
21 that still stays -- you know -- being privileged or
22 within work product.

23 The rule for the prosecution is written
24 much broader. If there is an expert who's looked at
25 the case in some fashion and you read 15.1(b)(4),

1 and it doesn't fit so closely with the type of
2 expert I think he's contemplated here, it seems to
3 apply most clearly to testing, comparisons, those
4 things. But the language does cover all types of
5 experts, I think.

6 But the state has a broader obligation.
7 If someone has looked at evidence and has an opinion
8 and you know it, you have to disclose it whether
9 there is a report or not. That's the way I see
10 that. The defense doesn't exactly have that
11 obligation unless the person is listed as a
12 witness. And then I think the obligations are the
13 same.

14 Ms. Do?

15 MS. DO: I absolutely agree with the Court. In
16 addition to that, we -- I don't know what
17 Ms. Polk -- I did send Ms. Polk a letter a few weeks
18 ago indicating to her that our medical examiner was
19 finishing up his analysis of this case, is going to
20 write a report, is available to the state for an
21 interview.

22 So we are absolutely in compliance with
23 our obligation with respect to trial expert
24 witnesses.

25 I do agree with the Court's assessment

1 that the burden on the prosecution is different than
2 the burden on the defense. But, again, we're back
3 to -- the issue at heart here is the fact that they
4 have a witness that they're going to call for trial.

5 And I know that in the notice given to the
6 defense, the state indicated he was going to testify
7 to group behavior. In the motion for protective
8 order, they added additional facts regarding the
9 proper opinions of this experts.

10 So we have not gotten full and fair notice
11 of what this expert is going to testify to. So if
12 Ms. Polk doesn't want to disclose her notes -- we're
13 not requiring it to be given to us in that form.
14 We're asking for disclosure of what his opinion,
15 analysis and conclusion are with respect to the
16 evidence he's reviewed in this case.

17 THE COURT: I think the discussion here has
18 removed some bit of confusion that arises with what
19 15.1(b)(1) encompasses with regard to statements.
20 And I think that's where the confusion comes in
21 about what is an expert statement. I really think
22 (b)(4) predominates.

23 And, Ms. Polk, that's the obligation. And
24 regardless of whether the expert has written up
25 something you would call a report, if the expert at

1 this point has looked at in this case statements,
2 that would be the evidence of the case. Statements,
3 predominantly. I would think there might be other
4 kinds of information, I suppose, certain documents
5 as well.

6 But if he's seen those and has some kind
7 of an opinion, what you would call a result, then
8 that has to be disclosed.

9 And I think the defense is saying they
10 would rather have that in a report form or have it
11 in that fashion. But I think the state's obligation
12 is to provide that information.

13 It isn't through your notes. You don't
14 have to provide it by divulging notes that are full
15 of work product. And I agree with the state. I
16 think the defense agrees too. Separating out work
17 product from notes of an interview, whether it's an
18 expert or another type of witness, is extremely
19 difficult. Just the fact of taking notes reflects
20 mental impressions just by what's being emphasized
21 or whatever.

22 But that is the way I read 15.1(4)4. And
23 I think that information should be turned over.

24 MS. POLK: Your Honor, I agree with that. And
25 we're not even there yet. The defense was demanding

1 the notes from conversations that we had in
2 retaining this expert. And that's all that's
3 happened at this point.

4 We've retained Mr. Ross. I'll have to
5 check with my staff to see if he's been provided any
6 information off the case yet. I don't know the
7 status. So we have not had an interview with
8 Mr. Ross where he tells us his impressions about the
9 case. That's out there. That hasn't even happened
10 yet.

11 But in the early stages of having
12 disclosed Mr. Ross, suddenly what the state was
13 getting was a demand from the defense that they get
14 our attorneys' notes from the conversations we had
15 in just trying to identify and retain Mr. Ross.

16 In fairness to the defense, we did notice
17 Mr. Ross as a witness for this hearing. And I
18 believe that's why they felt it so necessary to get
19 that information. But we withdrew that, the use of
20 Mr. Ross at this hearing.

21 And I suggest at this point now we need to
22 wait and follow the process, follow the rules. When
23 we have statements from Mr. Ross, we will certainly
24 disclose them. But Mr. Ross -- I'm not even sure
25 he's seen any information about the case yet. I

1 just don't know what stage we're at.

2 Suddenly the state was put in a posture
3 where we're trying to defend notes taken by
4 attorneys in having that initial conversation about
5 whether or not to retain him. That's what our
6 motion for protective order was about.

7 And at that time I understood the defense
8 to -- their possession was that they thought they
9 were entitled to all those notes from contact with
10 anybody. They've since much -- they've narrowed
11 it.

12 I think we're all in agreement. They do
13 get statements made by this expert. I don't believe
14 the state has any at this point. But if and when we
15 get them, we will certainly disclose them.

16 THE COURT: I think Ms. Do has made very clear
17 that the defense just felt that in light of the very
18 short time before the hearing, they needed to get
19 the information in whatever form it was available.
20 That's not the situation now.

21 But it's not far off, because really, with
22 the trial set in February, there is a lot of work to
23 be done.

24 MS. DO: Your Honor?

25 THE COURT: Yes.

1 MS. DO: We've been focusing this discussion on
2 the state's notes. And we did also make a request
3 the state to have Mr. Ross provide his notes, if
4 any. And that has not been responded to. And I
5 know that the Court did not take that up at the
6 early argument.

7 But we would renew that request again. We
8 have not yet received a response from the state.

9 THE COURT: And as a listed witness, I think
10 that's appropriate. If he was not listed, you look
11 carefully at 15.1(b)(4), it hasn't gotten to the
12 point of actually constituting a result or opinion,
13 comparison. Perhaps not.

14 But I think once somebody is listed, then
15 either side --

16 It applies to both sides, Ms. Polk.

17 I agree you're going to get to look at the
18 notes that go into that person's work on the case
19 once that person is listed as a witness, an expert
20 witness.

21 So I didn't mean to not address that. I
22 just thought the harder issue was the question of
23 attorney notes. And I'm just assuming that before
24 interviews of the experts occur, the other side is
25 going to have notes, going to have notes.

1 I'll still -- the ruling will be much more
 2 concise than it was shaping up before. But I think
 3 I made clear what I believe the interpretation is.
 4 The only thing, Ms. Polk and Ms. Do, is
 5 the experts have to do their work and information
 6 has to be exchanged. We just cannot get right up to
 7 the end and then find out that there really was
 8 information disclosed that hadn't been.

9 And these aren't the type of experts,
 10 Ms. Polk, that I think people are contemplating to
 11 be how you phrased it, cold expert, or where you
 12 just have somebody testify without a report and get
 13 information and answer hypotheticals or something.

14 What were you saying?

15 MS. POLK: Well, they might be, Judge. Where
 16 you call a witness who has an area of expertise or
 17 experience that can assist the jury in understanding
 18 a fact in the case.

19 THE COURT: Well, these experts have been
 20 listed and the information needs to be provided.

21 Anything else?

22 MS. POLK: No, Your Honor.

23 MR. LI: No, Your Honor.

24 MS. DO: No, Your Honor.

25 THE COURT: Thank you. Diane will be

1 contacting you. I'm going to have to look at some
2 scheduling and see what I think needs to be done.
3 But the question of getting the sweat lodge
4 records -- that's something that's come up. I
5 expect to see something on that quickly.

6 Thank you.

7 (End of partial transcript. Also end of court
8 session this day.)

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1 STATE OF ARIZONA)
2) ss: REPORTER'S CERTIFICATE
3 COUNTY OF YAVAPAI)

4 I, Mina G. Hunt, do hereby certify that I
5 am a Certified Reporter within the State of Arizona
6 and Certified Shorthand Reporter in California.
7 I further certify that these proceedings
8 were taken in shorthand by me at the time and place
9 herein set forth, and were thereafter reduced to
10 typewritten form, and that the foregoing constitutes
11 a true and correct transcript.

12 I further certify that I am not related
13 to, employed by, nor of counsel for any of the
14 parties or attorneys herein, nor otherwise
15 interested in the result of the within action.

16 In witness whereof, I have affixed my
17 signature this 8th day of December, 2010.

18

19 -----
20 MINA G. HUNT, AZ CR No. 50619
21 CA CSR No. 8335
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25